Bakery, Confectionery and Tobacco Workers International Union, Local No. 213, AFL-CIO-CLC *and* Krispy Kreme Division, Beatrice Foods Co.

Krispy Kreme Division, Beatrice Foods Co. *and* Bakery, Confectionery and Tobacco Workers International Union, Local No. 213, AFL-CIO-CLC, Petitioner. Cases 9-CB-4595 and 9-RC-13315

May 7, 1982

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On September 30, 1981, Administrative Law Judge John H. West issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In adopting the Administrative Law Judge's credibility findings, however, we disavow his adverse inference based upon the General Counsel's failure to call former employee Napper as a corroborating witness. We note that Napper was equally available to Respondent to refute testimony in support of the complaint allegations as she was to the General Counsel to corroborate such testimony. In such circumstances, we have concluded that no inference should be drawn. *Hitchiner Manufacturing Company*, 243 NLRB 927 (1979).

[2] In view of the Administrative Law Judge's credibility findings that employee union activist Foote made no statements contrary to the holding in *N.L.R.B.* v. *Sawair Manufacturing Co.*, 414 U.S. 270 (1973), we find it unnecessary to consider Foote's status as an agent of Respondent.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Bakery, Confectionery and Tobacco Workers International Union, Local No. 213, AFL-CIO-CLC, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All full and regular part-time production employees, packing employees, wrapping employees, shipping employees, sanitation workers and in store sales employees employed by the Employer at its 3920 Seventh Street Road and 3000 Bardstown Road, Louisville, Kentucky locations, but excluding all truck drivers, office clerical employees and all professional employees, guards and supervisors as defined in the Act.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge: The charge in Case 9-CB-4595 was filed by Krispy Kreme Division, Beatrice Foods Co. (herein called Krispy Kreme or the Charging Party) on June 5, 1980.[1] The complaint was issued therein on July 28. As amended at the hearing herein, it alleges that Bakery, Confectionery and Tobacco Workers International Union, Local No. 213, AFL-CIO-CLC (herein called Respondent or the Union) engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the National Labor Relation Act, as amended (herein called the Act) in that, assertedly: (1) its agents threatened an employee of the Charging Party that he would be deprived of his pension because of his failure to support Respondent's organizational activity; (2) other employees of the Charging Party were advised of this by an agent of Respondent; (3) its agents caused the pension to be revoked; and (4) two of its agents told employees of the Charging Party that they would not have to pay union initiation fees if they submitted authorization cards to Respondent prior to the Board-conducted election.[2] Respondent filed a timely answer denying the allegations made in the complaint.

[1] All dates are 1980, unless otherwise stated.

[2] As originally drafted, the complaint alleged that only one individual engaged in such conduct. In his opening statement, General Counsel alleged that Respondent's business agent, Ricky Simpson, also engaged in such conduct. It was stated by General Counsel that this allegation was based on evidence which he "discovered" or "became available to . . . [him] . . . [on the] evening [of March 18, 1981, the day before the hearing began]."

By order entered July 30, Case 9-CB-4595 was consolidated and set for hearing with Case 9-RC-13315. The latter involves objections filed on May 30 by Krispy Kreme to alleged conduct which assertedly affected the results of an election held on May 22 and 23 at its Louisville, Kentucky, facilities. The alleged objectionable conduct is the same as that alleged in the above-described complaint.[3]

A hearing in these consolidated cases was held before me in Louisville on March 19 and 20 and April 14, 1981. At the conclusion of the hearing, the parties waived oral argument and were given leave to file briefs, which have been received. The issues raised by the pleadings and the evidence are:

1. Whether two specified individuals acted as agents of Respondent within the meaning of Section 2(13) of the Act.

2. Whether both of these individuals threatened an employee with a loss of his pension because he failed and refused to support Respondent's organizational activity.

3. Whether Respondent carried out this threat by causing the employee's pension to be revoked.

4. Whether one of these individuals and an admitted agent of Respondent advised employees that they would not have to pay initiation fees if they submitted authorization cards prior to the election, and whether such conduct is a violation of Section 8(b)(1)(A) of the Act.

5. Whether the alleged conduct affected the results of the election.

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Krispy Kreme, a Delaware corporation, maintains offices and places of business in Louisville and is engaged in the manufacture and sale of baked foods. During the year before the issuance of the complaint, a representative period, it, in the conduct and course of its business operations, derived gross revenues in excess of $500,000. During the same period it sold and shipped from its Louisville facilities, products, goods, and materials valued in excess of $5,000 directly to points outside the State of Kentucky. It is, therefore, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[3] According to the Board's report on Objections to the Election, dated July 30, it is stated:

> The Employer's Objections alleged, in substance that: (1) The Petitioner [Respondent herein] threatened an employee with termination of his pension benefits because of his failure to support the Petitioner's organizing campaign.
> (2) The Petitioner informed various employees that it would terminate the pension benefits of an employee because he had failed to support the Petitioner's organizational activities.
> (3) The Petitioner solicited authorization cards from employees by promising to waive its initiation fee for those employees who sign authorization cards prior to the election.

II. THE LABOR ORGANIZATION

It is admitted, and I find, that Bakery, Confectionery and Tobacco Workers International Union, Local No. 213, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Pension*

1. The facts

In February 1980, the Union began its organizing drive at Krispy Kreme's two facilities in Louisville.[4] One of Krispy Kreme's employees, Leslie Ladd, had previously worked for over 30 years at A & P Tea Company, bakery division (A&P). While at A&P Ladd was a member of Respondent Union. He obtained a retirement card when A&P closed in 1977, and he began to work for Krispy Kreme, which did not have a union. In September 1979 Ladd applied for a pension from the Bakery and Confectionery Union and Industry Pension Fund (Fund). He filed the application at the Local Union hall, and was assisted by the secretary of the Union's business agent.[5] While processing the application the secretary was placed on notice that Ladd was working at Krispy Kreme.[6]

Ladd received his first pension check in March 1980, along with a letter and some booklets. One contains a retirement declaration, namely, that the retiree declares, among other things, that if he is under age 65, as was Ladd, he would "cease being employed or engaging in . . . [e]mployment with any employer in the same or related business as any employer who contributes to the Pension Fund." (Resp. Exh. 4, p. 3.) The declaration contains spaces for certifying the last date of employment in the industry, the date the declaration is signed, the application number, and the name. Ladd read the material, but at the hearing he claimed that he did not understand anything in the booklet. The letter indicates that the receipt of the pension was subject to, as here pertinent, Ladd's signing and returning "[o]ne copy of the enclosed Retirement Declaration." The letter went on to state: "The other copy of the Retirement Declaration very carefully." This portion of the letter, along with other portions of the letter, is stamped in red ink "This Section Does Not Apply."

When Ladd received his first pension check in March, he and his wife brought it to the Local union hall to show it to the secretary there who, as indicated above, had helped him process his application. The Local had a newly elected business agent, Simpson, who was also present and became aware that Ladd received his pension and that he worked at Krispy Kreme.

[4] One is located on Seventh Street Road and the other is located on Bardstown Road.

[5] Apparently an inquiry about the pension was initially received by the Fund in 1977.

[6] It is noted that in a telephone conversation with the Fund's secretary in September 1979, the Local's secretary indicated that Ladd's last employer was A&P. Resp. Exh. 2.

Additional pension checks were received in April and May 1980. During the aforementioned organizing drive Ladd spoke out against the Union at company meetings attended by Krispy Kreme employees. On April 16, he returned a call to retiree Gerald Palmer, formally an International representative for the Union and before that business agent of the involved Local. Ladd knew Palmer.[7] Both testified as to what was said during this telephone conversation which is the basis for one of the involved charges. There is a conflict. Ladd testified that Palmer began the substantive portion of the conversation by stating: "You know that pension you're drawing; you're not entitled to it . . . I hear you are working in the industry." Later during the conversation allegedly Palmer said: "Somebody might report you to the pension fund. Ladd then assertedly said: "You mean if I help the Union get in that I know I'm going to lose my pension; if the Union stays out, you'll report it and I know I'm going to lose it that way." To which Palmer allegedly replied: ". . . we . . . need your help at Krispy Kreme, and after all we've done for you at A&P we thought maybe you might help us, I don't think anybody's going to say anything about . . . [your pension] it'll just kind of go away." Palmer testified that first he brought up the organizing drive at Krispy Kreme and Ladd claimed ignorance indicating that he had not been requested to sign an authorization card; that after he told Ladd he was aware of what his attitude toward the Union was, Ladd replied: "You don't expect me to vote against my pension do you?"; that prior to Ladd's statement he did not know that Ladd was drawing a pension; that he then advised Ladd that he was not entitled to a pension since he was working in the industry and he was not yet 65 years old; and that Ladd later said: "Are you going to take my pension away?" to which Palmer replied: "Les, I couldn't if I wanted to. I don't want it."

Palmer's version of the conversation is credited. Palmer impressed me as being a credible witness. Ladd, regarding this conversation, did not. Ladd's version is incredible in that no reasonable person could have been expected to believe that Ladd's pension would go undiscovered if the Union came in.[8] Respondent points out on brief that if the plants were unionized and a pension plan were negotiated, the Fund would have become aware of Ladd's pension when Ladd began receiving additional credits under such plan. There would be little likelihood that Ladd's pension would go undetected in such circumstances. Moreover, Ladd's version is compromised by the fact that on cross-examination he gave the following testimony:

> Q. So when Mr. Palmer called you about the union situation you were thinking to yourself, were you not, that the Union could cost you your pension?
>
> A. I didn't think about that exactly, no. I wouldn't say so. All I wanted to do, I did not want the Union in Krispy Kreme. That's what I was thinking about.
>
> Q. Part of the reason was that you'd lose your pension?
>
> A. No. I disagree with you.

Ladd's own above-described testimony on direct indicates that he was concerned about the pension. Understandably it was something which was very meaningful to him and his wife. As indicated above, upon receiving his first check he and his wife made a special trip to the union hall to thank the business agent's secretary for her help in obtaining the pension. Also, his wife wanted to be reassured by the secretary that "it's ours." Their concern is understandable in view of the fact that the pension amounted to $6,000 a year.[9]

After speaking with Ladd, Palmer called Simpson later that same day and advised him that Ladd claimed ignorance about the organizing drive; that Ladd stated that he had not been approached to sign an authorization card; that Ladd would not support the Union; and that Ladd was drawing a pension although he was not entitled to it. Simpson was under the impression that Ladd could work in the industry as long as he was not working in a union shop. It is asserted by Simpson that he did not discuss Ladd's pension with Palmer prior to Palmer's call to Ladd. At the behest of Simpson, Foote, the following day, asked Ladd if he wanted to sign a union authorization card. Ladd responded: "Not now, I'll think about it."

On April 17, Simpson also contacted Frank Hurt, an International representative of the Union, who had been assisting the inexperienced Simpson with Krispy Kreme, since this was Simpson's first organizing drive. Simpson asked Hurt if a person could draw a pension if he was working in the industry but in a nonunion shop. Hurt thought that the pensioner could not even work in the industry but he was not "100%" sure. He testified that he unsuccessfully attempted to obtain the man's name from Simpson but Simpson refused to give it saying: "It will hurt our campaign [at Krispy Kreme]." Hurt called Simpson back the following day. In the interim, he had checked with one of his superiors, Earl Tetrick, executive vice president of the Union and a union trustee of the Fund. Tetrick told Hurt the pension would have to be suspended and he directed him to get the individual's name. After reminding Simpson of the obligations of his office, Hurt was told it was Ladd. Hurt later called Tetrick in Washington, D.C., and gave him Ladd's name.[10] Previously Hurt and Tetrick had discussed the fact that a former union member working at Krispy Kreme opposed the Union. But allegedly Tetrick was not aware that that same individual was drawing a pension from the Fund

[7] Although retired since 1976, Palmer visited the union hall about once a week in 1980 and he discussed, among other things, the Krispy Kreme organizing drive with Simpson, who advised him that a former union member, Ladd, opposed the Union. Palmer volunteered to call Ladd to attempt to influence him to support the Union.

[8] Ladd knew that if the Union came in to Krispy Kreme he would not be eligible for the pension.

[9] It is noted that Robert Foote, a Krispy Kreme employee who was a union activist, in his letter to Krispy Kreme's employees mentions an annual salary of $7,200, apparently referring to production workers G.C. Exh. 10. If this approximates Ladd's annual salary, the Ladds' concern is even more understandable.

[10] Hurt thought he called Tetrick around May 1.

until after Hurt's second telephone conversation with Simpson. On May 19, Tetrick called the assistant manager of the Fund, Arthur Krenek, who in turn forwarded a letter dated May 20 to Ladd advising, in part:

> The Fund Office recently received information that you are currently employed in a non-union bakery. Please be advised that Article VIII, Section 8.06 of the Pension Plan prohibits a pensioner to engage in any employment whatsoever in the Bakery and Confectionary Industry while receiving pension benefits from this Fund. The Fund Office would appreciate receiving information from you regarding your present employment status.[11]

Ladd responded by letter dated June 5 indicating that he was currently employed at Krispy Kreme as a production man.[12] Ladd's June 1980 check was voided and his pension was suspended.

Regarding the Fund, Krenek indicated that it is managed by a body composed of a board of trustees made up of eight employee trustees and eight union trustees who formulate the pension rules and regulations which determine who can receive a pension; that all the local unions do is negotiate collective-bargaining agreements, which provide for the contributions; that a local union cannot itself determine who is eligible for a pension but rather this determination is made pursuant to the rules and regulations of the Fund; that a local union does not have the authority to determine whether the pension should be suspended; that he made the determination to suspend Ladd's pension; that the rule in question is not discretionary but rather mandatory; and that he was not aware when he suspended the pension that there was an organizing drive at Krispy Kreme and that Ladd openly opposed the Union.

During the organizing drive, Ladd's pension was a topic of discussion among Krispy Kreme's personnel. Ladd worked at Krispy Kreme's Seventh Street Road facility. The manager at that facility, Art Drummon, advised Krispy Kreme's employees at a company meeting, which apparently was held before the organizing drive began and which apparently dealt with retirements, that Ladd was working on his second pension inasmuch as he was going to be drawing a pension from the Union.[13]

On May 18 Ladd and Foote had a heated verbal exchange regarding some work which necessitated Foote coming off his break before his time was up.[14] Although these two individuals had a good working relationship when Foote first came to Krispy Kreme, it had deteriorated. According to both Ladd and Foote the sore point in their relationship was the fact that Ladd attempted to tell Foote what to do and Foote resented this. Shortly after the above-described exchange, Foote told Ladd: "Old man, you've got your last check."[15] Ladd testified that the Union was not mentioned during the entire course of this exchange. Ladd went on to state:

> [Foote] might have mentioned it to somebody else, what would happen if the Union was in there or in the Union got in or something. [sic] But in my presence the word Union was never mentioned.[16]

Foote testified that during this exchange he told Ladd, "I tell you what old man, I'll see you won't draw a pension." He also indicated that the word union never came up during this exchange.[17]

After Palmer spoke with Ladd, Foote participated in a discussion with Palmer and Simpson about the fact that Ladd was not eligible for the pension. Foote admits that

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[11] G.C. Exh. 4. The rule in question reads:

> If a Pensioner engages in employment or self-employment in the Bakery and Confectionary Industry in the United States or Canada, his pension benefits shall be suspended for any calendar month in which he is so employed and for up to 12 additional months after ceasing such employment. After that period, his benefits shall again become payable. [Resp. Exh. 1, p. 19.]

Also, regarding the retirement declaration, Krenek indicated that the practice of requiring a pensioner to sign a declaration and send it back was discontinued before Ladd received his first check and that is why the old form letter which accompanied the check was stamped "This Section Does Not Apply."

[12] In the letter, Ladd also states his belief that Krispy Kreme is not in the involved industry and he points out that when he applied for the pension, the representatives of the Union were told that he worked at Krispy Kreme but they advised that it did not matter.

[13] It would seem that Krispy Kreme has its own pension plan.

[14] More specifically, according to Ladd, Foote was "cutting" yeast raised donuts and Ladd was "cutting" cake donuts. Foote turned to Ladd, who at that time was lead production man, and advised him that he should "get someone on the stacker." Foote than went to the breakroom. Ladd's cake machine was running so he went to the breakroom and said: "Bob, would you take that stacker and take your break later?" Foote told Ladd to have someone else do it. Ladd indicated that everyone else was busy and "[i]f you don't want to do it, I'll go back and I'll catch it myself. But when I make out my report why I'm late starting the Krispyettes . . . [t]he office is going to hear about it." Soon after Ladd started working at the stacker Foote came out of the breakroom and said: "I'll catch them and if you ever turn any bad report in on me I'll . . . knock you out." Foote's version of the exchange does not differ in any material respect from Ladd's. According to Foote, when he advised Ladd that he was not going to interrupt his break and told Ladd that "you're not my boss," Ladd replied: "I'll take you in the office and you'll find out who your boss is."

[15] Foote also told Ladd that he had heard that Ladd was a rat for 20 years at A&P.

[16] Ladd did have a conversation with Foote about Business Agent Simpson and his predecessor, and he indicated that he may have discussed the Union with Foote and others in the mixing area at various unspecified times. The conversation with Ladd about Simpson, according to Foote, took place after the election because "[w]e didn't talk nothing about the Union before the election."

[17] One other employee witness Gerald Lewis testified about this exchange:

> I was there on a Tuesday and Ladd told Bob to catch a stacker and he didn't want to catch a stacker. So Bob told Ladd that he was going to take his pension away any way he could, through the Union or through Simpson.

On cross-examination, Lewis first testified that he remembered specifically that Foote said: "through the Union or Simpson." Then he testified that Ladd and Foote were arguing about the Union. Later he testified he just *assumed* they were arguing about the Union because "All I heard was Union and then later that day Ladd told me, you know, that they were arguing about the Union . . . . and that was why he was mad that day. When he gave the Board agent his affidavit in June 1980 Lewis indicated that Foote was angry at Ladd about the stacker. Lewis' version conflicts with the testimony of both Ladd and Foote that the Union was never mentioned. Moreoever, Ladd testified that his exchange with Foote was not heated in that "[t]here was no argument there at all, that I could say. If he was not angry during the exchange and the Union was not even mentioned, it is difficult to understand why, as Lewis testifies, Ladd would have been angry about the Union that day. Lewis' testimony about the exchange cannot be credited.

he did tell other Krispy Kreme employees that the Union was going to suspend Ladd's pension.[18]

Five of Krispy Kreme's employees testified about the Ladd pension. Employee Tina Parris was present when Foote, before the election, told "several people sitting in the breakroom . . . that he felt that Ladd was drawing his pension illegally and that it would soon cease." She also testified on direct examination that she heard Foote tell Ladd "that he was not going to be receiving his pension any longer." On cross-examination, however, she testified that she never heard Foote say anything to Ladd about his pension; that when Foote did mention the pension to her or other employees he indicated that it would be suspended because he believed Ladd was drawing it illegally; and that Foote also "might have had a personal grudge behind it, too [sic]." Another employee, Lewis, testified that Foote "said he was going to get his [Ladd's] pension taken away . . . [because Ladd] shouldn't draw it working for Krispy Kreme." Foote never said anything to Lewis about what the Union's position was on the pension. Employee Teddy Logsdon testified that Foote told him that Ladd's pension "was getting taken away . . . he's already taken steps . . . . [Foote] said he [Ladd] wasn't suppose to be working at Krispy Kreme's shop because he'd worked at A&P Bakery and was drawing a pension." Foote told Logsdon that Ladd "wasn't suppose to be working in a bakery . . . and drawing a pension," and "the Union had already took steps to remove his pension [sic]."[19] Another employee who testified on this subject, Mary Nelson, stated that she never had any discussions with Simpson about Ladd's pension; that she never heard Foote discuss Ladd's pension; that she never had any discussions with Ladd about his pension; that neither an official of the Union nor an employee of Krispy Kreme ever told her that the pension was being cut off because Ladd was against the Union; that Drummond would mention the pension when he walked through the plant, and Drummond was the only one she heard say that the pension was being cut off because Ladd was against the Union; and that she overheard employees Darlene Napper and Parris discuss the fact that Drummond had said something about the pension with Napper stating that "she thought it was—the Union was dirty to do something like that."[20] Zoada Neff was asked by Assistant Manager Napper, of Krispy Kreme's Seventh Street facility and Darlene Napper's brother-in-law, a few days before the election whether she heard anything about Ladd losing his pension. This was the only time she could recall Ladd's name coming up during the organizing drive.

[18] It was later discovered by Foote that the Union had no authority itself to suspend the pension. In an affidavit given by Foote to a Board agent (G.C. Exh. 13); Foote stated: "I deny telling Ladd or anyone else that the Union was *taking steps* to end his pension. I never told him or anyone else that I would do anything I could to cut off his pension." (Emphasis supplied.) At the hearing Foote testified that while he said the Union was going to take it away he never said the Union was *taking steps* to take the pension away, and that he did not know what the Union was doing about it. In the same affidavit Foote stated, "I can't remember whether I said anything to him [Ladd] about his pension." At the hearing he admitted remembering that he said something to Ladd about his pension when the affidavit was given but he did not want to admit it at that time.

[19] Logsdon mistakenly believed that any conversation he had with Foote about Ladd's pension took place in March. Apparently he had two conversations with Foote on the subject. When Logsdon was advised that the Union had taken steps to suspend the pension he was already aware that Ladd would lose the pension because "he wasn't suppose to be working at Krispy Kreme, because it was another bakery."

2. Analysis

As here pertinent, for the reasons stated below it is my opinion that paragraphs 5, 7(a) and (b), and 8 of the amended complaint should be dismissed.[21]

The facts of record do not support the allegation that Palmer "threatened . . . [Ladd] that he would be deprived of his pension because of his failure to support Respondent's organization activity." As indicated above, Palmer's version of this conversation is credited *vis-a-vis* Ladd's version. The former's version contains no threat, explicit or implied. Accordingly, paragraph 5 of the amended complaint is dismissed.

Amended paragraph 7(a) alleges that during May 1980, Foote "told [Krispy Kreme's] employees that Respondent would deprive an employee of his pension because of his failure to support Respondent's organizational activity." Again the facts of record do not support the allegation. Foote did tell the other employees that Respondent would deprive Ladd of his pension but in no instance did Foote explicitly state or imply that this would be a consequence of Ladd's opposition to the Union. Rather, in each and every instance of record where the reason was stated by Foote to the other employees it was because Ladd was drawing the pension illegally or Ladd should not have a pension and at the same time be working for Krispy Kreme, which is a bakery. None of the employee witnesses testified that it was their understanding that the pension was suspended because of Ladd's antiunion stance. If there was any reason other than the fact that the rules and regulations of the Fund specifically prohibited what Ladd was doing, one is left with pure speculation or conjecture. In any event, the record does not support the allegation made in amended paragraph 7(a) of the complaint, and, accordingly, it is dismissed.

While it is alleged in amended paragraph 7(b) of the complaint that Foote on or about May 18 told Ladd that Ladd would be deprived of his pension because of his failure to support Respondent's organizational activity, the facts of record do not support this assertion. Ladd himself testified that the Union was not mentioned in his heated exchange with Foote. What was said during this personal dispute had nothing whatsoever to do with whether Ladd opposed or supported the Union's organizing drive. Foote was angry because his break was interrupted and he did not like Ladd threatening him and telling him what to do. In an outburst he verbally struck at Ladd's Achilles' heel.

General Counsel contends on brief that the argument that Foote hated Ladd for reasons other than Ladd's protected activity in opposing the organizing campaign is

[20] Also, Scott Livengood, director of human resources of Krispy Kreme, mentioned the pension to Nelson on two occasions.

[21] As originally issued these paragraphs were numbered 5, 6(a) and (b), and 7, respectively.

fallacious and takes a myopic view of the factual circumstances. Assertedly, "employee allegations that an employee is a 'rat,' a 'company suck,' or a 'tattletale' are fairly constant concommitants [sic] of normal organizational activity, and Foote made the same time-honored accusations to Ladd on May 18." Also it is argued by General Counsel that "Foote's primary dislike for Ladd—his perceived tendency to 'rat' on employees—is part of the *res gestae* of any organizing campaign." It is General Counsel's position that to hold Foote's threat to Ladd to be noncoercive because it did not refer specifically to Ladd's conspicuous antiunion posture would be to exalt form over substance. Respondent, on the other hand, points out on brief that Ladd had no reason to believe that Foote was in a position which would enable him to affect any cutoff of the pension.[22]

While, as pointed out by General Counsel, the Board held in *Professional Research, Inc., d/b/a Westside Hospital*, 218 NLRB 96 (1975), that a union organizer's threat to an Hispanic employee that if he did not support the union he would be reported to the Immigration and Naturalization Service violated Section 8(b)(1)(A) of the Act, this is not the situation here. For if Ladd supported the Union and if the plants became unionized, Ladd would, even under his own understanding of the pension rules, be drawing a pension in violation of the Fund's rules. In *Westside Hospital, supra*, the threat of possible deportation was used as leverage in an attempt to get the employee to support the Union. Here there was no leverage. To accept the position of General Counsel and Krispy Kreme would be to believe that the Union threatening Ladd with the loss of something that he would lose if he did what the Union wanted. Even in Ladd's uncredited version of his conversation with Palmer, the latter is supposed to have said "I *don't think* anybody's going to say anything about . . . [your pension], it'll just *kind* of go away." (Emphasis supplied.) Supposedly this indefinite assurance was going to convince Ladd to run the risk of losing $6,000 a year. Absent a change in the Fund's rules, Ladd's support of the Union would have worked to his detriment. No assurance to the contrary would have convinced a reasonable man to support the Union. One would have to refuse to accept the realities of the situation to believe that the Union was attempting to use the pension as leverage. Foote did not tell Ladd that he would lose his pension because of his failure to support Respondent's organizational activity. And Ladd did not lose his pension because he failed to support the Union. Practically speaking Ladd really had no choice; he could not support the Union. Neither participant in the involved exchange viewed it as anything other than a personal matter which did not involve the Union. Neither indicated that the exchange had anything to do with whether or not Ladd supported the Union. Ladd was about to lose his pension because he was drawing it in violation of the rules of the Fund. Foote was aware of this and he used this knowledge to get back at Ladd for threatening him and thereby intimidating him to interrupt his break. As indicated above, Ladd advised Foote that if he did not come off break the office was going to hear about it. Foote reacted to this and nothing else. Obviously Foote perceived this as a threat to "rat" on him. That is why he called Ladd a "rat" and told him that he was a rat at A&P. It was not, as asserted by General Counsel, a "concommitant [sic] . . . of normal organization activity" or "part of the *res gestae* of any organizing campaign." It was simply Foote's reaction to Ladd's threat that he was going to tell management. In the circumstances, amended paragraph 7(b) of the complaint is dismissed.

Paragraphs 8(a) and (b) of the amended complaint allege that Respondent, acting through Simpson and Hurt, attempting to cause, and thereafter caused, the Fund to revoke Ladd's pension because he failed and refused to support Respondent's organizational activity; and that they thereby engaged in an unlawful labor practice within the meaning of Section 8(b)(1)(A) of the Act. General Counsel argues that Respondent "procured" the termination of Ladd's pension; that it did so in retaliation of Ladd's antiunion stand; and that but for Ladd's protected opposition to Respondent's organization activity, Ladd would be drawing his pension benefits today. Assertedly, the Fund "was indeed privy to an awareness of Ladd's opposition to Respondent" and "[t]hat Ladd was not in fact technically entitled to the pension under the Fund's rules is of no consequence under the circumstances."

Respondent, on brief, points out that the local union could not have violated the Act by suspending Ladd's pension simply because it did not effect the suspension. The local has no authority to suspend and assertedly had nothing to do with the decision to suspend. The assistant manager of the Fund, Krenek, effected the suspension and it is correctly pointed out that he did so with no knowledge of any organizing drive at Krispy Kreme or of Ladd's stand on any organizing drive.[23] Respondent indicates that the section of the plan applicable to the suspension of Ladd's pension states that a pension *shall* be suspended in a situation such as Ladd's; and that Krenek testified that this section has been deemed mandatory, rather than discretionary. Citing *Los Angeles County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Electronic and Space Technicians Local 1553, AFL-CIO (Hughes Helicopters, Division of Summer Corporation)*, 224 NLRB 350 (1976), Respondent submits that the Board has held that conduct which is lawful is not rendered unlawful only because it occurs in the context of protected activity. In that case the Board affirmed the conclusions of the Administrative Law Judge that it was not a *per se* violation of the Act for a union to expel a member based on misconduct which comes to the union's attention when the member gives testimony as a government witness in a Board unfair labor practice proceeding. The Administrative Law Judge therein noted that he could find no support for General Counsel's novel proposition, which holds in effect that:

[22] On direct examination Ladd testified that he figured Foote was for the Union. But on cross-examination Ladd testified, "I didn't know if . . . [Foote] was for the Union, you know working for the Union [or] working against the Union . . . ."

[23] The unrefuted testimony of Krenek is credited.

> if . . . a union discover[s] for the first time during a Board hearing through the testimony of an employee that this employee is guilty of serious misconduct (i.e., stealing or destroying property) which ordinarily would result in discipline, the employer or union is nevertheless precluded from disciplining the employee. [*Id.* at 355.]

He went on to state:

> The Act in my view does not call for such an absurd result. The question in my view is whether the witness during the normal course of business would not have been disciplined for engaging in the confessed misconduct, if the witness had not testified for the Government in the Board proceeding. [*Id.* at 355.]

Here there is no question but that Ladd was drawing the pension in violation of the Fund's rules. Obviously there would be no violation of the Act if Simpson and Hurt reported Ladd before the organizing drive started. So too, it apparently would not be a violation in General Counsel's eyes if Ladd supported the Union. What allegedly makes it unlawful is that Ladd opposed the Union. In effect General Counsel argues that because Ladd openly opposed the Union, Simpson and Hurt were precluded from reporting this violation to the Fund because in doing so they were retaliating against Ladd for his opposition to the Union. It is the position of General Counsel that but for Ladd's protected opposition to Respondent's organizational activity, Ladd would be drawing his pension today. General Counsel may be right to an extent. If Ladd had not opposed the Union, Palmer would not have had reason to call him and, in turn, Simpson would not have been placed on notice by Palmer as a result of that phone call that there was a question as to whether Ladd could draw the pension while under age 65 and working in the industry. If Hurt had not discovered the pension, most likely nothing would have been said during the organizing drive since Simpson, a neophyte regarding pension matters, formerly believe Ladd could work in the industry as long as he was not working in a union shop. But were Simpson and Hurt unlawfully motivated to the extent they participated in the suspension of the pension? It would appear that neither individual had a real choice in the matter. Once the pension question was set in motion both were placed in a position of providing the information which resulted in the suspension or themselves suffering the consequences of refusing to provide it; both had obligations. Not relying on what Palmer told him, Simpson inquired of Hurt whether someone under age 65 could work in the industry while drawing the pension and Hurt, in turn, asked his superior the same question. Hurt's superior, Tetrick, is a trustee of the Fund and as such obviously has certain obligations and duties. Tetrick told Hurt to obtain the pensioner's name and Hurt, in turn, told Simpson he was obligated to provide it. Simpson did. And when he did it really did not matter to Simpson, from a practical standpoint, whether Ladd supported or opposed the Union. The suspension of the pension would not make the Union look good to the employees at Krispy Kreme, the employees he was attempting to organize.[24] The Act would not require, in a situation such as the one on hand, that Simpson and Hurt refuse to provide the information and suffer the consequences. Under the circumstances, Simpson and Hurt were not unlawfully motivated when they provided the information which led to suspension of Ladd's pension. According, paragraph 8 of the amended complaint is dismissed.

B. *The Waiver of Initiation Fees*

1. The facts

Foote distributed most of the authorization cards to Krispy Kreme employees.[25] A number of the employees testified regarding what Foote did or did not say when he handed out the cards. Parris, who works in the office at the Seventh Street facility as a bookkeeper and also in production,[26] testified on direct that when Foote gave her and Darlene Napper[27] cards he said: "Most of the employees had already signed cards, and that if we—we should go ahead and sign a card also to avoid paying a fee"; and that Foote did not say how much the fee would be and she signed the card. On cross-examination Parris testified that she signed the card because she did not want to have to pay an initiation fee; that Foote actually said "initiation fee" not "fee"; that she regretted signing the card; and that regarding whether anyone with Krispy Kreme ever talked to her about initiation fees, she remembered "[t]here were men that came from the company that talked but . . . [she could not] remember even what the conversations were about."

Patricia Akemon, who also works at Krispy Kreme's Seventh Street facility, was asked by Foote to sign an authorization card—"[Foote] just asked me if I would sign that card and give it back to him as soon as possible and that's all that was said."

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[24] The timing of Tetrick's notice to Krenek concerns me. According to Hurt, Tetrick was given Ladd's name around May 1. Yet apparently he waited until May 19 to notify Krenek. This would mean that Ladd would not receive Krenek's letter until after the election. Was Tetrick's delay intentional? If so was it done to avoid making this an issue during the organizing drive? Actually, Ladd's pension was already an issue, notwithstanding any action on the Fund's part. Foote, Drummond, Livengood, and Assistant Manager Napper, discussed the pension with Krispy Kreme's employees. It was a foregone conclusion that it was going to be suspended. But the actual suspension, as believed by Simpson, could have adversely affected the organizing drive. Nonetheless, even if this was reason for the delay, and even if Simpson was privy to or in some way responsible for the delay, it would not, in my opinion, justify the conclusion that Simpson was unlawfully motivated when he provided Ladd's name.

[25] Simpson did not solicit signatures on the authorization cards. As pointed out by General Counsel on brief, the Board has held that statements about the effects of authorization cards, made by an individual who is entrusted with the responsibility of distributing them, may be properly attributed to a principal. *Laclede Cab Company, d/b/a Dollar Rent-A-Car*, 236 NLRB 206, 210, fn. 11 (1978).

[26] She was hired to become a full-time bookkeeper when the bookkeeper at Seventh Street retired. During the first 6 months of 1980, she worked strictly in production.

[27] Unlike Parris, Napper no longer works at Krispy Kreme. She did not testify at the hearing herein. According to Parris, she was advised by Nelson that Foote was trying to get the employees together to organize a union, "[a]nd so we [Parris and Napper] went back there after she told us that and he [Foote] said it was true what we heard."

Dorothy Vermillion, who works at the Bardstown Road facility, testified on direct examination that Foote and Simpson came to the Bardstown Road facility in the spring of 1980 and asked her if she signed an authorization card to which she replied: "No"; that another time Foote came to the Bardstown Road facility with another man; that they introduced themselves but she "didn't pay any attention . . . to their names"; that the other man said he was from the Baker's Union; that they said they had noticed that she had not signed an authorization card and she replied: "No"; and that nothing else was said at that time. Vermillion further testified that later Foote came to her home with another man; that the other man told her his name but she could not remember it; that the other man had a suit on and Foote was wearing his white Krispy Kreme uniform; that Foote did the talking and the other man did not participate in the conversation "[h]e just stood there";[28] that Foote said he noticed that she had not sign a card and she replied: "No";[29] and Foote, before driving off with the other man in a small dark red car, (1) asked her if she had a car; (2) called her a "damn foreigner"; (3) told her that the initiation fee would be $10 if she signed before the Union got in and if she did not, it would be $100; (4) told her that if she did not sign the card before the election that she could not vote; and (5) told her that if the Union got in, it would be a closed shop. On cross-examination, this witness testified that the man who came with Foote to her home was the same union representative (not Simpson) who came with Foote to Bardstown Road; that this other man did not give her his name at the shop; that when this other man came to her house he "had on a dark red shirt and that's all I can remember about it"; that the other man who was with Foote at her home did not make any statements at all—not one word—"[h]e was very embarrassed but he didn't say anything"; and that when she gave her affidavit to a Board agent she did indicate that the other man stated: "Well she's entitled to her own opinions," and that the other man did in fact say this. At one point on redirect examination Vermillion testified, "It's been so long ago and my memory is not that good." Vermillion never signed an authorization card.[30]

Logsdon, a production man at the Seventh Street facility, testified that he was asked by Foote in mid-March 1980 to sign an authorization card. Foote did not hand Logsdon a card[31] but when Logsdon said he did not want any part of a union Foote allegedly stated: "Well, it would be a hundred and fifty dollars initiation fee if you don't sign a card," and "if you sign a card, all you have is dues." Also, Foote is alleged to have indicated that it would be a closed shop and Logsdon would have to pay the initiation fee. Later that month when he was delivering donuts to the Bardstown Road shop Logsdon was approached by Foote. Logsdon again told Foote he did not want any part of the Union.[32] According to Logsdon, Foote said that the Company would "continue . . . [to be] mean to you." On cross-examination Logsdon initially denied that Foote, when he first attempted to get Logsdon to sign an authorization card, said that there were already enough cards signed to get an election. After he was shown the affidavit he gave to a Board agent he eventually conceded that Foote did in fact make this statement. But, as pointed out on redirect examination, Logsdon did not, as indicated in his affidavit, believe that Foote had enough cards at that time to get an election. Logsdon never signed an authorization card.

Lewis, who also works at the Seventh Street facility, testified that Foote gave him an authorization card in March and told him that if he signed the card before the election it would not cost him anything, but if he waited until after the election it would cost him $125. According to Lewis, Foote told him about the initiation fee four or five times during a 1-week period in March, and Lewis testified that he overheard Foote making the same statement to three of four women in the breakroom the same week he received his card. He could not remember the names of any of the women. While he allegedly heard Foote tell the women the amount of the fee, he could not recall what it was. But he did recall discussing with Logsdon the fact that there was a $25 difference in the amounts allegedly quoted to them.[33] Also, shortly after the election Nelson, according to Lewis, stated: "Ha! We won the election. Now you're going to have to pay the $125." Allegedly Lewis said nothing in response.[34] On cross-examination when Lewis was asked what he said when Foote gave him the card Lewis replied: "Well, we talked a little bit, you know. It's been a year. I can't hardly remember what was said." He did remember he told Foote that he would mail the card himself, in response to Foote's offer to mail it. And as far as Lewis could remember on cross-examination that was the extent of the conversation. Regarding the second conversation with Foote that week, Lewis testified that he could not remember the content of the conversation. But Lewis testified that during the conversation Foote told him that if he signed a card he would "get in free,

[28] Two other times on direct examination the witness testified that the other man did not say anything.

[29] At this point in the testimony the following exchange took place between General Counsel and the witness:

Q. Anything else? Did he say anything else about the cards?
A. Huh?
Q. Did he say anything about the Union card?
A. Yes.
Q. What did he say, can you remember?
A. No. My mind is a complete . . . .

As indicated *infra*, the witness subsequently testified about what was said.

[30] This witness testified that at one point in the conversation at her home "they said if they didn't get $7 or $8 an hour they would go out on strike, and I told them I could not go out on strike because I could not afford it, that I wouldn't walk the picket line. I told them I'd go and get me another job."

[31] Logsdon thought Foote had a card cupped in his hand but he did not see it. However, Logsdon then testified that Foote *offered to hand him a card* later at the Bardstown facility.

[32] At this point in his testimony Logsdon stated that he would not say and he did not know if Foote had a union card. Logsdon did not see a union card.

[33] Logsdon corroborated his conversation with Lewis regarding the alleged difference in the amount of the initiation fees.

[34] According to Lewis, Nelson told him about the initiation fee a couple of times before the election.

before the election. But if . . . [he] waited until after the election it would cost . . . [him] a hundred and twenty-five dollars." Lewis never signed an authorization card.

Neff, who works on the second shift at Krispy Kreme's Seventh Street facility received 18 authorization cards from Krispy Kreme employee Vickie Murdock, who merely told her to hand them out. Neff said nothing about initiation fees when she passed out the cards.

Mary Lees testified that she received her authorization card from Foote who said nothing about union initiation fees. Nelson, who received her authorization card from Foote, testified that Foote did not mention the initiation fee when he gave her the card.

Brenda Meyer testified that she received her authorization card from Foote who said nothing about union initiation fees when he gave it to her. Foote did tell her that he needed a certain percentage of signed cards.

Other employees also testified about what Foote is alleged to have said about initiation fees before the election. Laura Price testified that Foote asked her to sign a card but apparently did not say anything about initiation fees at that time. Also she initially testified that Foote and Nelson told employees in the breakroom that if "you don't sign a union card, then if the union came in, you'd have to pay an initiation fee in order to get into the union."[35] On cross-examination, however, she testified that she could not say for sure what Foote said in the breakdown about an initiation fee; that she really did not recall what Foote and Nelson said.

Sada Moore testified that Foote asked her if she had received a card. He did not discuss initiation fees.[36] Also, this witness indicated that there was general confusion among employees as to whether they would have to pay an initiation fee. Meyer and Lees also testified about this confusion with the former indicating that just after the cards were signed people in the breakroom teased one another that if they did not vote for the Union they would have to pay an initiation fee,[37] and the latter indicating that there was a lot of talk about initiation fees amongst the employees. Neff indicated that employees discussed the initiation fees and some people were confused. Nelson testified that Drummond walked through the plant saying: "The damned . . . Union is going to make you pay initiation fees"; that "Drummond kept telling them different things. They'd have to pay initiation fees; that fees like $125 and $150"; and that she heard employees discussing the fact that they thought they would have to pay an initiation fee if they did not sign an authorization card before the election. Just after the election, Nelson had a conversation with Lewis in which she allegedly said: "Well, you want to pay your $115 I guess . . . [y]ou knew better than that, didn't you?" According to Nelson, Lewis replied that he knew better than that; that he voted for the Union; and that he was for the Union but he was "scared of his job."

During the campaign two meetings were held at a restaurant, Sandy's, which is located near the Seventh Street facility. The first meeting was attended by Simpson, his secretary, Nelson, Foote, and five other Krispy Kreme employees who worked on the first shift.[38] Versions of what was said at the first meeting differ. That is not the case, however, with the second meeting, which was attended by Simpson, his secretary, Nelson, Foote, and about seven of Krispy Kreme's second-shift employees. The latter meeting occurred less than a week before the election. On page 3 of his affidavit (G.C. Exh. 3) Simpson states: "At the second shift meeting at Sandy's I told those present that nobody would pay any dues or any initiation fees until we got a contract." Arriving after the second meeting began, Neff heard Simpson say that: "The ones [employees] that was [sic] there, if the Union got voted in wouldn't have to pay an initiation fee but if there was some hired later on, if the Union got in, they would have to pay." No authorization cards were passed out at the second meeting and Neff could not remember any discussion of cards at that meeting. The first meeting apparently was held some time in April.[39] It was described by seven witnesses and, as indicated above, some of the accounts vary. Simpson conducted the meeting. One of the employees in attendance, Parris, asked Simpson if the plant became unionized and Krispy Kreme no longer needed her in the office would she be able to work in production. Parris, who did not give an affidavit to the Board, testified that Simpson responded that as long as she had "sign[ed] a card . . . [she] would be allowed to work, and that . . . [she] would not have to pay an initiation fee . . . [a]nd that went for everyone else too."[40] According to Parris, Foote said that em-

[35] It was brought out on cross-examination that this witness made her views against the Union pretty clear from the outset. On one occasion she spoke against the Union at a company meeting. This witness was confused about the timing of her return to work from surgery. She testified that she had surgery on March 25 and was off for 9 weeks, returning in June, yet she also testified that she voted in the May 22-23 election and that the above-described statements of Foote and Nelson could have taken place after she returned to work.

[36] This witness, who testified on rebuttal, also indicated that Foote asked her to forge employees' signatures to authorization cards. Although Foote testified on cross-examination during Respondent's case that he did not recall the exact content of this conversation, on surrebuttal, he denied that he made this request.

[37] The witness did not think Foote took part in these discussions but she was not sure. Also, she indicated that people teasingly asked one another whether they had paid their dues yet.

[38] The other employees were Parris, Meyers, Napper, Lees, and Akemon.

[39] Accounts of when the meeting was held varied from the last of March (Parris) to about May 12 (Nelson). Parris further testified that it occurred about 3 weeks after she signed her authorization card, which is dated March 11.

[40] On direct examination Parris testified that Simpson said, "and that went for everyone else too that signed a card." She also testified that when Simpson mentioned that there would be an initiation fee he indicated that it would be $125 but that it could be less and that the Union would decide how much each person would have to pay. Akemon also testified that Simpson said "The people at the meeting had already signed cards so . . . they wouldn't have to pay an initiation fee, but the ones that hadn't they would have to pay an initiation fee. It was a hundred and something." On cross-examination she, like Parris, could not remember exactly what Simpson said about insurance—"He just said the benefits would be better. Our hospitalization and stuff would be better, a lot better than we have." Akemon testified that she had not discussed her testimony with Parris or anyone else and assertedly no one asked her about her recollection of the meeting prior to her testifying at the hearing herein. Additionally, Akemon testified that Foote also stated during the meeting that "the people that hadn't signed a card would have to pay an initiation fee." On direct examination Akemon testified that she had a coke during the meeting and initially on recross-examination she testified

Continued

ployees present "should get on those who had not signed cards." At one point during the meeting Simpson is alleged by Parris to have answered a question indicating that if a certain percentage of people signed cards then the vote would not be necessary.[41] Simpson testified that a number of things were discussed during the meeting, including insurance and benefits. But he told the employees that he could not promise anything.[42] During the meeting Parris asked him whether she could split her workweek between office work and production work. He allegedly replied that he did not know and he would have to check it out.[43] Parris also asked whether she would have to pay an initiation fee if she worked full-time in the office and wanted to come back to production later on. Simpson testified that he advised her that "After we got this union thing settled, after the election and everything we'd—that she would have to pay the initiation fee, after we were able to negotiate a contract—with Krispy Kreme." Simpson thought one of the emloyees asked if there would be an initiation fee and he thought he discussed the Union's policy[44] but he was not sure.[45] Regarding authorization cards, Simpson testified that there was no discussion about them, "[t]hey were already turned in, and we'd *already petitioned* for an election, I'm pretty sure." (Emphasis supplied.)[46] Also, he indicated that he did not say anything about any means by which the Union might get in without an election,[47] and he never sent a letter to Krispy Kreme demanding recognition.

On rebuttal, after Nelson indicated on cross-examination, during Respondent's case, that she did not tell Livengood that Simpson said at a meeting that employees would have to pay an initiation fee if they did not sign a card, Livengood was called by company counsel and testified that he was at the Seventh Street plant about a week after the election.[48] He was talking with Nelson and he allegedly said that the thing that disturbed him was that some of the employees who he had heard had not signed cards would have to pay an initiation fee.[49] Allegedly Nelson said that:

> [T]he employees did have an opportunity to sign a card. That it was brought up at a union meeting and presented to them by the—a union representative at that meeting . . . prior to the election. That in order for them not to have to pay an initiation fee, that they would have to sign a union card. A union authorization card.

This witness also testified on direct examination that the Company had at least two meetings with employees; that he conducted one of the meetings and that Drummond conducted the other;[50] that initiation fees were discussed at these meetings, they were "discussed in general, but not in any specifics"; and that the Company indicated "[t]hat there was a possibility that there is a clause in union constitutions to allow for initiation fees to be charged."

On cross-examination, Livengood indicated he did not attend the company meetings with employees conducted by Drummond but he reviewed the "transcript" with counsel Dernard's office for legal sufficiency. The meetings were not recorded electronically but Livengood reviewed a written draft, a "guide that Mr. Drummond followed at the meeting."[51]

Regarding the alleged Nelson statement, Livengood, in response to the question "[w]ere you aware that—those statements, if they had been made, would be grounds for

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that Simpson paid for all the drinks. When then asked by counsel for Respondent whether she recalled Simpson saying that he could not pay for the drinks because he did not want Krispy Kreme to think it was a bribe, Akemon replied that she did remember the statement and the employees paid for their own drinks. Akemon testified that, as indicated above, she did not discuss her testimony with anyone; that prior to testifying she had no occasion to reconstruct what occurred at this meeting which was held almost a year before the hearing herein; that she was called by General Counsel the morning she testified (the second day of the hearing herein) and advised that she had to testify; that she had never spoken to General Counsel before that; and that while General Counsel personally transported her to the hearing they did not discuss her recollection of the meeting. It would appear that Akemon did not give an affidavit to the Board. She indicated that at the time of the union meeting she was for the Union.

[41] Parris believed that Napper asked why employees should "have to sign cards anyway." Akemon testified that if Simpson said anything about a percentage of cards he needed for any reason she did not remember such a statement.

[42] Meyer, who mistakenly indicated in her affidavit that she attended the two union meetings, corroborated the fact that Simpson made no promises. Foote also testified that when he was discussing benefits Simpson said he could not guarantee the employees anything, and they would have to bargain for it.

[43] Nelson corroborated this.

[44] The Union's policy, as stated by Simpson, is that it does not "charge anybody initiation fee period for a newly organized shop." Hurt had advised Simpson at the beginning of the organizing drive that the Union always waived the initiation fee for all employees that worked for the Company prior to negotiating the contract. Otherwise, Hurt explained, the Union would lose the election.

[45] Foote testified that Simpson said all initiation fees are waived. Nelson testified that Simpson said, "There was no initiation fees for us to pay. That for the people that already worked there—was already working with Krispy Kreme, but anybody that come [sic] in after that, after the Union got in and everything, that, then, they would have to pay an initiation fee." Nelson believed that people hired after the election would have to pay. She indicated that Simpson did not say anything about "after the Union had a contract." Meyer testified that Simpson said: "if you are working at Krispy Kreme at the time that the Union was voted in, you would not have to pay an initiation fee. But, if you were hired in afterwards, you would"; and that Foote had told her before the meeting in response to her question, that "Whoever had been hired in after it had already went through, they would have to pay." One other witness, Lees, testified about her understanding of the Union's policy regarding initiation fees but she was not sure that Simpson imparted this information at the involved meeting.

[46] Although the petition for certification of representative filed by the Union is dated March 26, it was stipulated that the petition was filed March 28, 1980. Authorization cards were not passed out at this meeting. All of the employees there had in fact already signed a card. Foote testified that he did not know whether the cards were submitted to the Union, but he was sure they were all passed out at that time.

[47] Foote, Nelson, and Akemon corroborated this.

[48] As noted above, the election was held on May 22 and 23.

[49] According to Livengood, Drummond told him that Lewis had said this to Drummond.

[50] Apparently if they were, as Livengood indicates, more than two company meetings with the employees someone other than Livengood represented the Company at the meetings.

[51] As indicated *infra*, one of the employees who attended one of the company meetings, Foote, alleges that "Drummond read from a piece of paper that there would be an initiation fee of $75." (G.C. Exh. 13, p. 3; Foote's affidavit to the Board dated June 26.) Possibly Drummond may have strayed from the guide provided him. Drummond did not testify. Foote's assertion, therefore, is credited.

overturning the election? testified: "Yes . . . [a]ll I did know was the grounds for overturning the election, I knew that that was illegal." Yet Livengood never asked Nelson to sign a statement concerning this matter, and he did not give any affidavit to the Board with respect to this conversation. In response to further questions, Livengood testified that Nelson did not name the union representative; and that she did not indicate where the meeting took place or *when the meeting took place.*[52] On redirect examination, Livengood testified that he told the Company counsel Pearson about the alleged Nelson conversation.

In his effort to have the alleged Nelson statement admitted counsel for the Company argued that it was an admission against interest by an agent of the involved Union. The agent was never identified and no allegation has been made herein that Nelson was acting as an agent of the Union. Livengood's testimony, however, is not only hearsay it is also not believable; it is incredible. To credit it one would have to believe that notwithstanding the fact that (1) Livengood was aware of the legal significance of Nelson's alleged statement; (2) Livengood told company counsel Pearson about Nelson's alleged statement; and (3) Pearson along with counsel for General Counsel Kopenhefer took affidavits from a number of the people involved,[53] this was for some valid unexplained reason not discovered and made a part of this case until 9 months later when at the first day of the hearing herein counsel for General Counsel Kopenhefer announced that he wished to amend the complaint to include an allegation that Simpson, the only one who discussed initiation fees at Sandy's,[54] told employees of the Charging Party that they would not have to pay union initiation fees if they submitted authorization cards to Respondent prior to the election, and this allegation was based on evidence which he "discovered" or "became available to . . . [him] . . . [on the] evening [of March 18, 1981, the day before the hearing began]."[55] Livengood's testimony regarding Nelson's alleged statement can not be credited. And his testimony regarding the Company's statements to employees about initiation fees cannot be credited. Livengood was not a credible witness.

Inasmuch as Parris had worked in the office and, according to Foote, she wanted to work there again, Foote was hesitant to give her an authorization card. He was also hesitant to give Napper a card because she was the assistant manager's sister-in-law. Nonetheless, he gave both of them cards at the same time and both signed them and gave them back to Foote. He did not remember discussing initiation fees with Parris and Napper when he gave them their cards or when they returned them to him. But after Drummond was placed on notice that there was an organizing drive Foote started to talk to employees about the Union.[56] Parris was working in the office a few days a week, and she discussed with Foote what would happen if she was switched from the office to production "after . . . [the Union] had a contract and . . . was in . . . ." Allegedly, he advised her, aware that she had signed an authorization card, that if that occurred she would probably have to pay an initiation fee.

Before Drummond received the above-described letter from the Union, Foote assertedly made a point of not discussing the Union with Logsdon since he did not trust Logsdon who he believed would tell the Company and might cause him to lose his job. Shortly after the letter was received, Foote saw Logsdon making a delivery at the Bardstown Road facility. Foote asserts that this is the first time he discussed the Union with Logsdon and the only time he asked Logsdon to sign an authorization card. Logsdon, upon being asked by Foote if he would sign an authorization card, replied: "You're crazy. You know it won't go. They'll fire you. They're going to fire you. They fire everybody that tries to get a union in. They always have. You must be nuts." Foote denies that he ever had a conversation with Logsdon about initiation fees.[57]

Foote was "pretty sure" he gave Lewis an authorization card but he did not recall having any conversation with him at the time he gave him the card. He believes that he told Lewis "at some point or another that all initiation fees would be waived" and he denies that he told Lewis that the initiation fee would be waived if he signed a card. Foote believed that Lewis was a company man and he was advised by other employees that Lewis had just been married and Foote had better watch him because he had changed.

During the organizing drive, Foote heard that Vermillion had stated that he and Simpson had sexually har-

[52] As indicated above, on direct examination Livengood had testified that Nelson said the meeting took place "before the election."

[53] It is assumed that it was Pearson from Meyer's and Kopenhefer's description of the individual. In any event the individual who took Meyer's affidavit was described as "the Company lawyer." This was not denied. As indicated by Meyer's testimony the affidavit dealt with the Union's meeting at Sandy's. Simpson, on page one of his affidavit taken by Kopenhefer on June 26 (G.C. Exh. 3) stated: "I held . . . union meetings with about 7-8 person present [at] each. They were both at Sandy's around the first of April." On the last page of the same affidavit, as indicated above, Simpson states: "At the second shift meeting [which, as indicated above, was the second meeting] at Sandy's I told those present that nobody would pay any dues or initiation fees until we got a contract."

[54] Akemon's assertion that Foote also spoke about initiation fees at the first meeting at Sandy's is not corroborated even by the other witness called by General Counsel. Moreover, it would be highly unlikely that even, assuming *arguendo*, Livengood's testimony was truthful, Nelson would have described Foote as a union representative.

[55] It is noted that Livengood himself signed the charge in Case 9-CB-4595 on June 2 which was about the same time that he indicated that he had his above-described conversation with Nelson. G.C. Exh. 1(a).

[56] As indicated above, Parris' card is dated March 11. Resp. Exh. 6. The letter to Drummond informing him that Foote was assisting the Union in its organizing drive was dated March 14. G.C. Exh. 2. As Foote indicates in his affidavit, "[a] few days after the letter was sent to them with my name on it they started pulling small groups into the break room. I was in one. Drummond read from a piece of paper that there would be an initiation fee of $75." G.C. Exh. 13, p. 3. Eventually this figure was raised to $150. In response to employees' subsequent questions, Foote indicated that he advised the employees that there would be no initiation fee; that it was waived; but that if there had been, the amount would have been $125.

[57] Logsdon, who works on the second shift usually comes in well before the shift begins. He would go to Foote, who was finishing up on the first shift, and say: "You're not going to win. It's not going to go. They'll fire you. They're going to fire you. They always fire. They've fired everybody else who tried it."

assed her. Allegedly Foote never saw Vermillion before the election herein, when as an observer he heard her name called out. Foote denies that he went to Vermillion's house and he denies that he ever went to Bardstown Road facility with any union official other than Simpson.

On cross-examination Foote admitted that portions of his affidavit were not factual. On brief, General Counsel contends that "[c]onservatively estimated, Foote was substantially impeached with his investigative affidavit approximately 16 times." Respondent on brief points out that Foote testified that:

> [A]t the time he gave the affidavit he was simply trying to forget the events of the election, which had been very painful to him because of Company harassment and simply had imprecise recall. He also had been working all night[,] was tired and had trouble reading Kopenhefer's handwriting.[58]

Some of the misstatements in the affidavit are trivial. Some are not. One of the two admittedly false portions of the affidavit dealing with matters of significance refers to the Ladd pension. Also another portion of the affidavit which is not factual, and which is found on page 6, deals with the Ladd pension. While this has some effect on Foote's overall credibility, such credibility was not determinative in deciding the Ladd pension issue. Ladd's testimony was in substantial agreement with Foote's. The other portion of the affidavit which Foote testified was false deals with the matter at hand, *viz*, the waiver of the initiation fees. Specifically Foot, in the affidavit stated:

> I don't believe I discussed the Union's waiver policy when I gave out cards. It's hard to remember. *I may have discussed it when I gave them cards, especially when they asked about it. If they asked me about it when I passed them out I certainly did tell them about it. About two at most asked me.* I told them, "the initiation fee is waived. We go in as a group—everybody." I deny I ever told anyone that they had to sign a union card before the election in order to get out of the initiation fee. I might have told some how much the fee was, but I made it clear that nobody would have to pay the fee. [Emphasis supplied.]

On cross-examination, Foote testified that he did not believe the italicized portion of this statement is the truth; that as far as he could remember no one asked about initiation fees; that when he gave the affidavit he could not rembember whether any employees asked him about initiation fees but he thought they did; and that it was his recollection when he testified at the hearing herein that they did not ask him it.

The italicized portion was prefaced, as indicated above, with Foote's statement that he did not believe he discussed initiation fees when he gave out authorization cards. He also indicated that it was hard to remember. And what follows the italicized portion, *viz*, an unequivocal denial that he "ever told anyone that they had to sign a union card before the election in order to get out of the initiation fees" is really the issue at hand. After reviewing the evidence, it is my opinion that while Foote's credibility was adversely affected by what was brought out on cross-examination regarding the affidavit, it was not materially adversely affected to the extent that his testimony should be disregarded. While misstatements in affidavits cannot be condoned, this case does not turn solely on the credibility of Foote. Admittedly, he made misstatements in his affidavit but, nonetheless, I found him to be a credible witness while testifying at the hearing herein. As indicated herein, that is not the case with certain of the other witnesses.

2. Analysis

Amended paragraph 7(c) of the complaint alleges that Respondent acting through Foote during mid-March 1980 at the employees' facility, told employees that they would not have to pay union initiation fees if they submitted authorization cards to Respondent prior to a Board-conducted election. The facts of record do not support this allegation.

Four Krispy Kreme employees, Parris, Vermillion, Logsdon, and Lewis, testified that Foote told them individually when he passed out authorization cards that they would not have to pay union initiation fees if they submitted authorization cards to Respondent prior to the election. There were no witnesses to any of the alleged unlawful waivers except that which allegedly occurred between Parris and Foote. And the alleged witness to that unlawful waiver, Darlene Napper, was not called to corroborate Parris' version. Napper no longer works for Krispy Kreme. Seven witness testified that Foote discussed authorization cards with them individually but none of these witnesses indicated that Foote made what would be an unlawful conditional waiver of initiation fees.[59] This alone of course does not mean that Foote could not have acted unlawfully as alleged by the four. But Foote denies that he ever told anyone that they had to sign a union authorization card before the election in order to avoid the initiation fee. And the testimony of the seven witnesses supports Foote's assertion. On the other hand, the testimony of the four witnesses claiming that Foote acted unlawfully when he distributed the authorization cards cannot be accepted as credible. Each of the four, for the reason stated below, gave testimony which cannot be relied on, testimony which, in my opinion, was intentionally meant to favor Krispy Kreme at the expense of the truth.

As indicated above, while there was a witness present when Foote gave Parris her authorization card, that witness, Napper, who no longer works for Krispy Kreme, was not called to corroborate Parris' version. Parris signed her authorization card on March 11, which was before the letter was sent to Drummond indicating that Foote was aiding the Union in organizing Krispy Kreme employees. Foote indicated that he was very concerned

[58] The affidavit was not typed but rather handwritten by Kopenhefer. After Foote testified "I can't hardly [sic] read your writing" Kopenhefer stated "neither can I." As indicated above, the affidavit was received.

[59] Lees, Meyer, Nelson, Ladd, Akemon, Price, and Moore. The last four named witnesses were called collectively by General Counsel and the Company.

about being fired before the letter was sent and was circumspect in his conduct. He did not trust Parris because at one time she worked in the office and wanted to work there again, and he was concerned that word of his activities would get back to the Company. Darlene Napper was the sister-in-law of Krispy Kreme's assistant manager at the Seventh Street facility. General Counsel argues that Foote made an offer of financial inducement to most employees who displayed any reluctance to sign an authorization card. This was not the case with Parris however. Parris and Napper came to Foote. Parris needed no real inducement to sign the card. Albeit she alleges that Foote said that she should sign the card to avoid paying an initiation fee, she also testified that Foote did not say how much the initiation fee would be. It could have been nominal; i.e., $1.[60] And, therefore, if one were hesitant there would have been, from a practical standpoint, no real economic inducement to sign an authorization card. While Parris remembered the exact words Foote allegedly used, "initiation fee" and not just "fee" she allegedly could not remember what the men sent in by the Company may have said about initiation fees. In fact, she could not even remember what the company men said about anything. Parris was not a credible witness. She was the only one who testified regarding the first meeting at Sandy's that Simpson, in response to a question, stated that if a certain percentage of people signed the cards then an election would not be necessary. The other witness called by General Counsel could not remember Simpson making such a statement. Others present testified that no such statement was made. Parris believed that Napper was the one who asked the question, *viz*, why should employees have to sign cards anyway. Napper had already signed an authorization card weeks before the meeting and she did not testify herein. She no longer works for Krispy Kreme. Also, Parris believed that the first meeting took place at Sandy's about 3 weeks after she signed her card. As indicated above, the card was signed March 11. Simpson and others testified that there was no discussion of authorization cards at the meeting because all of the employees present had already signed authorization cards. Simpson indicated that the cards were already turned in and he thought that the Union had already petitioned for an election. If the meeting occurred 3 weeks or more after Parris signed her card, then the petition would have been filed already. At no time did the Union request recognition based on a majority of employees' signed authorization cards. Parris impressed me as being an aggressive, ambitious individual who would not hesitate to, and did in fact, place self-interest above the truth. Her testimony cannot be credited.

Vermillion testified that Foote in the company of an unidentified union representative made what would amount to an unlawful conditional waiver of an initiation fee while attempting to get her to sign an authorization card at her residence. Foote denied that he ever saw Vermillion before the day of the election. Vermillion's allegation is different in that she alleges she was told that if she signed an authorization card before the election she would have been charged $10. No one else made a similar allegation.[61] Parts of Vermillion's recitation are incredible. And during her testimony Vermillion contradicted herself with respect to: (1) whether this unidentified union representative had in fact introduced himself in the earlier visit to the Bardstown facility; (2) what this unidentified representative was wearing when he visited her at her residence; and (3) whether this unidentified union representative did in fact speak during his visit to her residence. When pressed on redirect examination for details, the witness sought escape with: "It's been so long ago and my memory is not good." Vermillion's testimony was rambling. She was very nervous while testifying, constantly fidgeting and hesitating for long periods before answering. She gave the impression that she was either fabricating a portion of her testimony as she testified or that she was attempting to recall the content of her affidavit. Vermillion impressed me as being a very frightened individual, frightened not necessarily about testifying but about her job. Frightened to the extent that, if necessary, she would be less than truthful, although reluctantly, to insure that she kept it.[62]

Logsdon and Lewis also alleged that Foote made what would have been an unlawful conditional waiver of initiation fees in an attempt to get them to sign authorization cards. Foote denies this. Both Logsdon and Lewis also impressed me as being individuals who were very frightened about keeping their jobs. Nelson's testimony that right after the election Lewis said that he was for the Union but he was "scared of his job" is credited notwithstanding Lewis' denial that he said anything at that time because Lewis is not a credible witness. As indicated above, his version of the Ladd-Foote altercation was not supported by either of the principals. Lewis remembered little about his conversation with Foote other than what Foote is alleged to have said about initiation fees. Logsdon did not deny that he repeatedly told Foote that the Company was going to fire him; that they "fire everybody that tries to get a union in"; and that Foote was "crazy . . . nuts" for making the attempt. Logsdon did not want any part of the Union. While Logsdon and Lewis differed in physical appearance and in the way they testified,[63] they shared a common bond in that both, in my opinion, had an overwhelming fear of losing their jobs. That fear, in my opinion, cast a cloud between the truth and falsehood so that with this obfuscation only the latter was visible to these two individuals. Their testimony, like that of Vermillion and Parris, cannot be credited. The record, therefore, does not support the al-

[60] Compare *N.L.R.B.* v. *Stone & Thomas*, 502 F.2d 957 (4th Cir. 1974).

[61] Taking this to its possible logical conclusion, one must wonder what, if Vermillion is believed, Foote would have done with a $10 check made out to the Union.

[62] The witness did indicate that she had "started" a union herself at a Louisville department store a long time ago when she was making 85 cents an hour. Clearly that was at a different time and under different circumstances.

[63] Logsdon, at the time of the hearing, was a lean individual who attempted to give the impression of being very sure of himself to the point where he had tremendous difficulty in accepting the fact that his affidavit contradicted certain of his testimony. Lewis was the physical opposite. He lacked self-confidence and hesitated frequently while testifying. He was not even sure whether the election he voted in took place in May or March.

legations made in amended paragraph 7(c) of the complaint, and it is dismissed.

Amended paragraph 6 of the complaint alleges that during late March or early April 1980, the exact dates being unknown to me, Respondent, acting through Ricky Simpson, told employees that they would not have to pay union initiation fees if they submitted authorization cards to Respondent prior to a Board-conducted election.[64]

In support of this allegation General Counsel called two witnesses, Parris and Akemon, who tsstified about one meeting they both attended which was conducted by Simpson at a local restaurant.[65] Both allege that Simpson said that employees who signed authorization cards would not have to pay an initiation fee. Akemon alleges that Simpson said the employees who had not signed authorization cards would have to pay an initiation fee.[66] Everyone who was present agreed that no authorization cards were passed out at the meeting. In fact all the employees in attendance had already signed authorization cards.

As indicated above, Parris, in my opinion, is not a credible witness. Akemon testified that prior to testifying at the hearing herein she did not discuss what occurred at this meeting, not even with General Counsel who spoke with her for the first time the morning she testified, advising her that she had to testify, and personally transporting her to the hearing. Akemon remembered little else about the meeting other than what Simpson and Foote allegedly said about initiation fees. And her version of what else she remembered appears to be contrary to what others present remembered. To illustrate, according to Akemon, Simpson said that "Our hospitalization and stuff would be better, a lot better than we had." Other witnesses testified that Simpson specifically said he could make no promises about benefits. In an attempt to demonstrate that Akemon could recall other aspects of this meeting, General Counsel on redirect examination asked her whether she ordered any food. She remember she had a Coke. But when asked on recross-examination who paid for it she initially testified that Simpson paid for it along with all of the other employees' Cokes. Only after she was asked if she recalled Simpson saying that he would not pay for it because he did not want the Company to think it was a bribe did she recall that employees had in fact paid for their own drinks. At a minimum Akemon was confused in her recollection of what was said and what occurred at this meeting. Her testimony is not reliable and is not credited. Napper also attended this meeting but she was not called as a witness.

What did Simpson say about initiation fees at the first meeting at Sandy's[67] Accounts vary from Simpson saying all initiation fees are waived to "there was no initiation fee for us to pay . . . people that already work there . . . but anybody that come [sic] in after the Union got in and everything . . . they would have to pay an initiation fee" to "if you are working at Krispy Kreme at the time that the Union was voted in, you would not have to pay an initiation fee. But, if you were hired in afterwards, you would," to Simpson himself testifying that he thought he gave the union policy, *viz*, that all initiation fees are waived, but he was not sure.

I hesitate to make a finding with respect to exactly what Simpson stated at the first meeting at Sandy's regarding initiation fees. There is no credible evidence of record, however, in support of the contention that Simpson told employees that they would not have to pay union initiation fees if they submitted authorization cards to the Union prior to the election. The Union does not have the burden of proof on this issue. It is noted that all of the employees at the meeting had already signed authorization cards. None were passed out at the meeting. And, if the meeting was held in early April, the Union had already filed a petition for an election. Simpson testified that he was pretty sure he already turned the cards in.

General Counsel and the Employer allege that the type of conditional waiver condemned by the Supreme Court in *N.L.R.B.* v. *Savair Manufacturing Company*, 414 U.S. 270 (1973), was made here. There the Court was faced with the situation where: (1) there was an election and the company filed objections to it; (2) union officials explained to employees at meetings that those who signed authorization cards would not be required to pay an initiation fee while those who did not would have to pay; (3) those who solicited authorization card signatures advised employees that there would be no initiation fee charged as to those who signed authorizations before the election; (4)

> [t]he record demonstrates the pressure which employees felt to sign up with the Union quickly, before the election and perhaps even before the representation petition itself was filed, a pressure utterly inconsistent with a belief that a waiver would be available to them up to the time a collective-bargaining agreement was signed after the election. [*Id.* fn. 4 at 273 and 274.]

(5) employees testified that they signed authorization cards because otherwise they would have had to pay an initiation fee; and (6) the change of just one vote would have resulted in a 21 to 21 election rather than a 22 to 20 election. The majority of the Court[68] in affirming the Sixth Circuit Court of Appeals, which reversed the Board, held that the Board could not sanction a procedure whereby a union waives initiation fees if employees

[64] As indicated above, General Counsel amended the complaint the first day of the hearing herein to include this allegation which was based on evidence he "discovered" or "became available to . . . [him] . . . the evening [before the hearing began]."

[65] On rebuttal the Company called Livengood to testify about a union meeting where an unidentified union representative spoke. As indicated above, his testimony is not credited. Apparently none of these company witnesses had given affidavits regarding what was allegedly said by Simpson at the meeting.

[66] Akemon alone also alleges that Foote made this same statement during the meeting.

[67] Since Akemon's testimony cannot be relied on, her uncorroborated assertion that Foote also spoke of initiation fees at Sandy's is not credited.

[68] Chief Justice Burger and Justices Douglas, Stewart, Marshall, Powell, and Rhenquist. Justices White, Brennan, and Blackman dissented.

sign authorization cards before the election rather than up to the time a collective-bargaining agreement is reached.

In the instant proceeding it has not been established that employees were advised by the Union or by someone acting on its behalf that they would have to sign authorization cards before the election in order to avoid paying an initiation fee. Except for Parris, only three employees, Vermillion, Logsdon, and Lewis, testified that they were pressured by threats of an initiation fee. Not one of the three attended the meeting at Sandy's. As indicated above, the testimony of these three individuals has not been credited. None signed an authorization card. Parris did attend the meeting at Sandy's but she signed her authorization card 3 weeks before the meeting was held. Obviously she could not have, therefore, been pressured to sign an authorization card by any statement made at the meeting. In fact, not one witness testified in the instant proceeding that he or she signed an authorization card subsequent to the first meeting at Sandy's and before the election because he or she wanted to avoid paying an initiation fee. Unlike the situation in *Savair Mfg. Co., supra*, here the vote was 20 for the Union and 14 against the Union.[69]

Even if Simpson stated at either of the meetings at Sandy's that those *hired after the election* would have to pay an initiation fee, this would not amount to conduct condemned by the Supreme Court in *Savair Mfg. Co., supra*. The statement cannot be interpreted to mean that those working at Krispy Kreme at the time of the election would have to pay an initiation fee after the election if they had not already joined the Union. Individuals employed at Krispy Kreme at the time of the election could not believe that they were being pressured by such a statement. The only individuals who would be affected would be individuals who were not working at Krispy Kreme at the time of the election and who, therefore, would not be voting in the election. The Court in *Savair Mfg. Co., supra*, "was concerned with the . . . [protected] right[s] of employees to refrain from union activity and with the buying of endorsements through the waiver of initiation fees to those joining before the election and thereby painting a false portrait of employee support." *Kobayashi Travel Service d/b/a Polynesian Hospitality*, 223 NLRB 768 (1976). Here there was no such limitation. There was to be no initiation fee for those employed at Krispy Kreme at the time of the election. Consequently, regarding individuals who were employees of Krispy Kreme as of May 22 and 23, there was an unconditional waiver of initiation fees. Unconditional waivers were apparently approved by the Supreme Court in the dictum in *Savair Mfg. Co., supra*. They have been approved by the Board and reviewing courts. *The Prudential Insurance Company of America* v. *N.L.R.B.*, 529 F.2d 66 (6th Cir. 1976).

General Counsel and Krispy Kreme emphasize the fact that employees discussed initiation fees, and allegedly they were confused about whether they would have to pay one. There is no evidence of record that the employees' discussions or alleged confusion were the result of what was said at the first meeting at Sandy's. Whatever confusion existed appears to be the fault of Krispy Kreme. Credited testimony of record establishes that Drummond, the Seventh Street manager, told employees in at least one meeting and repeatedly on the production floor that the Union was going to charge an initiation fee. The fee assertedly was going to be anywhere from $70 to $150. Drummond did not testify at the hearing herein. Krispy Kreme does not deny that this occurred.[70] The Company created the confusion and now it is attempting to capitalize on it. This is not a situation where the Union jeopardized the chance for a fair election. Rather, Krispy Kreme made an issue out of what would otherwise have been a nonissue.

Since the record does not support the allegation of facts made in amended paragraph 6 of the complaint, it is dismissed. Consequently, it is not necessary to determine whether the alleged *Savair Mfg. Co., supra*, violation could be an unfair labor practice in violation of Section 8(b)(1)(A) of the Act.

VI. OBJECTIONS

In view of the fact that Krispy Kreme's objections are based on the same conduct as that alleged as the basis for the above-described unfair labor practices, and in view of the fact that it has been determined that there is no factual basis in the record for finding that the Union engaged in the conduct alleged, said objections shall be overruled.

CONCLUSIONS OF LAW

1. Krispy Kreme Division, Beatrice Foods Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Bakery, Confectionery and Tobacco Workers International Union, Local No. 213, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. As found above, the Union has not engaged in the unfair labor practices alleged in the complaint.

4. Krispy Kreme's objections to the election are not supported by the credible evidence of record and, therefore, are overruled.

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record herein, and pursuant to Section 10(c) of the Act, I make the following recommended:

ORDER[71]

The complaint in Case 9-CB-4595 is hereby dismissed in its entirety.

[69] There were four challenged ballots.

[70] As noted above, Livengood's testimony, to the extent that it could be interpreted to be a denial of this, is not credited.

[71] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

The objections in Case 9–RC–13315 be and are hereby overruled.